Supreme Court, U.S.
FILED
OCT 2 5 2004
OFFICE OF THE CLERK

No. 04-413

In The

Supreme Court Of The United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, et al.,

Petitioners

v.

RICK HOMANS and SANDER RUE,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATES OF CONNECTICUT, ARIZONA, COLORADO, IOWA, KENTUCKY, MARYLAND, MINNESOTA, NEW MEXICO, OKLAHOMA, VERMONT AND WISCONSIN, AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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Printed by

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INTEREST OF THE AMICI CURIAE

The amici curiae State of Connecticut and the States identified on the cover (the "Amici States"), by and through their attorneys general, respectfully submit this brief in support of the City of Albuquerque's Petition for a Writ of Certiorari.

The Amici States have a vital interest in this case because it will directly impact their ability to enact their own campaign finance reforms. Since 1976, when this Court struck down candidates' campaign spending limits in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Amici States have seen an astronomical increase in campaign spending by political candidates that has fueled a generally held perception that money buys power. They have further found that the intense pressure to raise funds negatively impacts the time that elected officeholders have available to serve the public and that, for an increasing number of their citizens, running for office is a financial impossibility.

To combat these extremely serious problems, which threaten to undermine the foundation of our democracy and have no easy solution, the Amici States, like the City of Albuquerque, have enacted, or would like to enact, a wide variety of campaign finance reforms, including reforms that limit candidate expenditures. As the "laboratories of democracy," the States' experimentation in this regard is crucial if viable solutions to this national crisis are ultimately to be found.

The States' ability to experiment with reform is jeopardized, however, by the cloud of uncertainty that has been created by the conflict between the Tenth Circuit's ruling in this case, which effectively held that *Buckley v. Valeo*, 424 U.S. 1 (1976), imposed a *per se* ban on campaign expenditure limits, and the Second Circuit's ruling in *Landell v. Sorrell*, No. 00-9159(L), 2004 WL 1837394 (2d Cir., Aug. 18, 2004), which reached precisely

the opposite conclusion. Because the resulting uncertainty over the constitutionality of any campaign finance reform measure involving expenditure limitations, if not resolved, will effectively foreclose all state reform involving such limitations and chill state campaign finance reform efforts in general, the Amici States respectfully urge this Court to grant the City's petition for a writ of certiorari in order to clarify this area of the law, reverse the Tenth Circuit's ruling, and permit the States to experiment with much-needed campaign finance reform.

REASON FOR GRANTING THE WRIT

THE UNCERTAINTY CREATED BY THE TENTH CIRCUIT'S RULING, IF NOT RESOLVED, WILL LIMIT THE STATES' ABILITY TO EXPERIMENT WITH CAMPAIGN FINANCE REFORM MEASURES INVOLVING EXPENDITURE LIMITATIONS AND THEREBY UNDERMINE THE STATES' VITAL ROLE AS THE "LABORATORIES OF DEMOCRACY."

As this Court has long recognized, the States are the "laboratories of democracy." *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *Arizona v. Evans*, 514 U.S. 1, 8 (1995). "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting).

One area in which such experimentation is not only valuable, but essential, is in the area of campaign finance reform, in which the same deep-seated problems identified by the City of Albuquerque threaten the integrity of the democratic process at all levels of government nationwide.

By experimenting with campaign finance reform, the States advance their own vital interest in structuring their own political processes at the State level while, at the same time, providing information that is crucial to resolving the federal campaign finance crisis that plagues the nation as a whole. Although the States, to date, have actively experimented with campaign finance reform, the uncertainty created by the conflict between the Tenth and the Second Circuits concerning the constitutionality of expenditure limitations threatens the continued vitality of these crucial state reform efforts.

A. The Compelling Interests Cited By The City Of Albuquerque In Defense Of Its Charter Provision Limiting Campaign Expenditures Are Interests Shared By States Nationwide.

Three compelling governmental interests motivated the City of Albuquerque to enact its city charter provision limiting campaign expenditures in municipal elections: (1) deterrence of actual or perceived corruption and enhancement of public confidence in the electoral process; (2) preservation of officeholders' ability to perform their duties without devoting excessive time to fundraising; and (3) encouragement of electoral competition. *Homans v. City of Albuquerque*, 366 F.3d 900, 907 (10th Cir. 2004). These interests are by no means unique to Albuquerque. On the contrary, they are interests shared by virtually every State in the country.

Like Albuquerque, the States have a compelling governmental interest in preventing corruption and the appearance of corruption in the electoral process. In Vermont, for example, the state legislature has found that "[l]arge contributions and large expenditures by persons or committees . . . reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens." 1997 Vt. Laws Pub. Act 64 (H. 28)(finding 9).

Citing evidence that "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention *because* the contributors will pay for their campaigns," *Landell v. Sorrell*, 2004 WL 1837394 at * 21 (2d Cir., Aug. 18, 2004), the Second Circuit has concluded that "Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it corrupts the process for achieving accessibility and accountability of state officials and candidates." *Id.*

The same is true of all States. *See, e.g.*, Colo. Const. Art. XXVIII, § 1 (2003). As this Court has emphasized, "the avoidance of the appearance of improper influence is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (internal quotation marks omitted).

The States also have a compelling interest in curbing the staggering cost of campaigning in order to allow officeholders to spend less time fundraising and more time performing their official duties. *See Landell v. Sorrell*, 2004 WL 1837394 at *26 (2d Cir., Aug. 18, 2004); *Rosenstiel v. Rodriquez*, 101 F.3d 1544,1553 (8th Cir.1996), *cert. denied*, 520 U.S. 1229 (1997); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). As one Senator has observed, "all too often [legislators] become fund-raisers first, and legislators second." 138 Cong. Rec. § 115 (daily ed. Jan. 6,1987)(statement of Sen. Byrd). The result is that legislators have little time to focus on their constituents' needs and what time they do have is often devoted to those who contribute the most. *Landell,* at *24-25.

The third interest cited by Albuquerque – the promotion of electoral competition – is likewise shared by the States. Across the country, incumbent candidates generally have far more access to campaign funds than their challengers and have enormous financial war chests

that discourage new faces from even attempting to run for office. In effect, running for office has become a financial impossibility for most Americans. *See* 1997 Vt. Laws Pub. Act 64 (H. 28)(finding 1); Colo. Const. Art. XXVIII, § 1 (2003); Adam Lioz, U.S. PIRG Education Fund Report, "The Role of Money in the 2002 Congressional Elections," (June, 2003).

Correcting these problems is of critical importance to the States. As a national survey has revealed, a majority of Americans are dissatisfied with the state of our political system and cite the role of money in politics as one of the primary sources of their discontent. Center for Responsive Politics, "A National Survey of the Public's Views on How Money Impacts our Political System," conducted by the Princeton Survey Research Associates (June, 1997)(available at www.opensecrets.org/pubs/survey/htm). Succinctly summing up the situation, one scholar has observed that the inordinate role that wealth plays in American politics is the "most pressing threat to American democracy today." S. Loffredo, "Poverty, Democracy and Constitutional Law," 141 U. Pa. L. Rev. 1277, 1279 (1993).

B. The Problems That Undermine The Current Campaign Finance System Have Been The Catalysts For A Wide Range Of State Campaign Finance Reform Efforts.

In response to the deep-seated problems plaguing the current system of campaign financing, the States have experimented with a wide range of reforms.

Vermont's legislature has adopted a comprehensive finance reform act that incorporates candidate expenditure limitations akin to those at issue in the present case, in addition to varied limits on in-state and out-of-state contributions, disclosure provisions governing political advertisements, and mandatory expenditure reporting requirements. *See* 1997 Vermont Campaign Finance

Reform Act ("Act 64"), codified at Vt. Stat. Ann. tit. 17, chap. 59 §§ 2801 – 2883.

Other States have tried myriad other reforms. For example, some States, such a Missouri, Oregon, Montana and the District of Columbia, have experimented with restricting campaign contributions to small amounts ranging from $100 to $250.

Other States have tried to limit the source of contributions. For example, Alaska tried capping the contributions that candidates for statewide office could receive from out-of-state contributors. *See* Alaska Senate Bill 191 (1996); *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000). In Oregon, the legislature passed a state constitutional amendment that prohibited candidates from state office from raising more than 10% of their campaign funds from contributors outside the candidate's electoral district. *See* Oregon 1994 Ballot Measure 6; *Vannatta v. Keisling*, 151 F.3d 1215 (9th Cir.1998), *cert. denied*, 525 U.S. 1104 (1999); *see also Landell* at *47-49..

Still other States have sought to ban certain contributions altogether. For example, Colorado amended its state constitution in 2002 to ban corporate and union contributions to candidates and political parties, in addition to imposing contribution limits and voluntary spending limits. *See* Colo. Const. Art. XXVIII.

In several States, including Maine and Arizona, the legislatures have experimented with public financing. In Maine, for example, a candidate may receive public campaign financing provided he foregoes any private contributions, including self-financing, and limits his spending to the amount provided by the fund. Me. Rev. Stat. Ann., Title 21-A, Chapter 14. If a candidate who runs such a "clean" campaign is out-spent by a non-participating opponent, the State matches the excess expenditures one-for-one. *Id.*

The significance of these reforms is their variety. While not all of them have withstood legal challenges, they each represent a creative approach to the problem. As one commentator has observed:

> It is clear that states have been activists in the area of campaign finance regulation. And while some common approaches and trends can be identified, it is also apparent that the varying political cultures in each state give rise to different solutions. What is deemed a problem in one state is often disregarded in another. . . . [E]ach state is its own laboratory for reform.

Ronald Michaelson, "Trends in Campaign Financing," *The Book of States*, Vol. 35, p. 275 (2003).

The advantages of such a situation are obvious. The States are able to experiment with unique reform measures that address their own particular needs and allow them to freely structure their own political processes. At the same time, such experimentation provides a valuable model for reform for other States and municipalities and, most importantly, for the federal government, which is itself struggling to address an enormous campaign finance problem in presidential and congressional elections nationwide. Clearly, the entire country benefits from the wealth of information generated by this scheme. As Justice Brandeis wisely warned, "[d]enial of the right to experiment may be fraught with serious consequences to the nation." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting).

C. Reform Efforts To Date Have Not Solved The Problems That Undermine The Current Campaign Finance System.

Despite the myriad state reform efforts to date, the problems plaguing the current campaign finance system

have not been solved. It has become increasingly clear that contribution limitations alone are not the answer and that further experimentation with additional measures, including expenditure limitations, is crucial.

In 1997, Vermont adopted expenditure limitations as part of its comprehensive campaign finance reform Act because it was evident to the legislature that unbridled campaign expenditures were forcing candidates to spend too much time fundraising, causing candidates to give preferred status to contributors over non-contributors, and hindering the robust debate of issues. *Landell* at *5. In particular, the legislature concluded that contribution limits alone, without expenditure limits, exacerbated the time problem because candidates were forced to spend more time collecting smaller contributions from a greater number of donors than would be the case with no contribution limits at all. *Landell* at *25. Contribution limits *coupled with expenditure limits*, however, meant that candidates simply did not have to spend as much time and energy raising money. *Id.*

In addition to addressing the time problem, expenditure limitations have the potential to prevent candidates from pouring unlimited amounts of money into advertising instead of communicating with voters through arguably more meaningful ways, such as through debates and speeches. As one study has pointed out, "[a]ll too often, frontrunners will simply refuse to debate [their] opponent[s], preferring instead to raise campaign funds and buy commercials." Derek Cressman, U.S. PIRG Education Fund Report, "Lone Star Election Laws," § II (July, 2000)(available at http://prig.org/democracy/democracy.asp?id2=5977&id3=CFR&). In such a situation, underdog candidates, who are at a disadvantage financially, "are unable to compete as effectively as they could in debates which put all candidates on more equal footing." *Id.*

Expenditure limitations also may be used to prevent millionaire candidates from using their own resources to vastly outspend opponents who are relying on small contributions. Derek Cressman, U.S. PIRG Education Fund Report, "Lone Star Election Laws," § II (July, 2000) (available at http://prig.org/democracy/democracy.asp?id2=5977&id3=CFR&). As noted above, "millionaire candidates distort the electoral process and make it considerably more difficult for ordinary citizens to run for office because the level of funds needed to compete with millionaires is beyond the reach of most candidates." *Id.* § II.

Given the potential for expenditure limitations to be valuable tools in controlling the influence of money in electoral campaigns not only at the municipal level, as in Albuquerque, but also at the state and federal level, further experimentation is vital. Only by allowing the States to explore freely and fully the possibilities of expenditure limitations will it be possible to determine whether, and to what extent, such limitations hold the key to solving the enormous campaign finance problem that is plaguing the nation's current electoral system.

D. The Conflict Between The Tenth And The Second Circuit, If Not Resolved, Will Jeopardize The States' Ability To Experiment With Reform And Fulfill Their Crucial Role As The Laboratories Of Democracy.

The Tenth Circuit's erroneous conclusion -- that all limitations on candidate expenditures are *per se* unconstitutional under *Buckley* and that none of the three governmental interests advanced by Albuquerque could ever provide a sufficiently compelling governmental interest to support expenditure limits -- threatens the States' continued experimentation with campaign finance reform in two significant ways.

First, it effectively forecloses the ability of the States to adopt reforms that include limitations on campaign expenditures. Although the Second Circuit concluded in *Landell* that *Buckley* did not constitute a *per se* ban on expenditure limitations, the uncertainty created by the conflict between the Tenth and the Second Circuits on the issue will be sufficient to deter many legislatures, even those in the Second Circuit, from gambling on the constitutionality of legislation that includes expenditure limitations. Given the time, effort, and compromise that is necessary to enact campaign finance reform, legislators may eschew pushing for reforms of questionable constitutionality.

Second, the conflict between the Tenth and Second Circuits' rulings creates uncertainty as to whether the States' interests in preventing corruption and the appearance of corruption, protecting the time of officeholders and candidates from the burdens of fundraising, and fostering electoral competition are "compelling." By holding, in contrast to the Second Circuit, that each of these three interests is "constitutionally incapable of justifying spending restrictions as a matter of law," *Homans v. City of Albuquerque*, 366 F.3d 900, 915 (10th Cir. 2004), and that the latter two interests are "neither new nor compelling," *id.* at 914, the Tenth Circuit indirectly raises uncertainty as to whether these interests would be adequate to justify other, as yet untested, types of reforms. Because, as noted above, uncertainty regarding an act's constitutionality renders it far less likely to be enacted, the Tenth Circuit's ruling will potentially have a chilling effect on new reforms that are based on the same compelling interests that were deemed constitutionally inadequate in the present case.

To avoid this situation, and ensure that the States are not foreclosed from vital experimentation based on a wholly erroneous interpretation of *Buckley*, it is essential

that this Court grant the Petition to review the Tenth Circuit's ruling in this case and clarify this important area of the law.

CONCLUSION

For all of the foregoing reasons, the Amici States respectfully request that the Court grant the City of Albuquerque's Petition for a Writ of Certiorari.

Respectfully submitted,

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